MAR 15 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18,
INTERNATIONAL TYPOGRAPHICAL UNION,
Petitioner,

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION,
THE DETROIT NEWS, and THE DETROIT FREE PRESS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement of the case	4
Reasons for granting the writ	10
1. The Sixth Circuit's decision casts doubt and confusion over the enforceability of an important and widely-used collective bargaining clause	11
2. The Sixth Circuit's ruling that federal courts lack power to construe or enforce status quo clauses conflicts with decisions of this Court	14
3. The Sixth Circuit's ruling that the status quo clause is enforceable only on proof of a high degree of irreparable harm is both confusing and inconsistent with this Court's decisions	17
4. This case will not be rendered moot on the rendition of the arbitrator's decision as to the merits of the underlying contract dispute	22
Conclusion	23
Appendix (judgment and opinions below)	1a

CITATIONS

Cases:

American Radiator & Standard Sanitary Corp. v. Local 7, 358 F.2d 455 (C.A. 6, 1966)	14
Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962)	15
Boys Markets, Inc. v. Retail Clerks Union, 398 U.S. 235 (1970)	10, 11, 14, 15, 16, 17, 19, 20
Brotherhood of Locomotive Engineers v. M.-K.-T.R. Co., 363 U.S. 528 (1960)	13

Page

Drake Bakeries v. Bakery Workers, 370 U.S. 254 (1962) 19
Erving v. Virginia Squires Basketball Club, 468 F.2d 1064 (C.A. 2, 1972) 13
Moore v. Ogilvie, 394 U.S. 814 (1969) 22
Operating Engineers v. Flair Builders, Inc., 406 U.S. 487 (1972) 15
Pittsburgh Newspaper Printing Pressmen's Union No. 9, et al. v. Pittsburgh Press Co., C.A. 3, Nos. 72-1495 and 72-1496 12
Printing Pressmen v. Pittsburgh Press Co., 343 F.Supp. 55, 81 LRRM 2436 (W.D. Pa. 1972) 12
Roe v. Wade, No. 70-18, Jan. 22, 1973 22
Steelworkers Trilogy, 363 U.S. 564 (1960) 14, 15, 16, 20, 21
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957) 14, 15, 16, 20, 21

STATUTES AND MISCELLANEOUS:

Labor-Management Relations Act, § 301(a) 4

Norris-LaGuardia Act, § 7 3

Department of Labor, Collective Bargaining Agreement Grievance Procedures, Bulletin No. 1425-1 (November 1964) 12

2 Pomeroy, Equity Jurisprudence (5th ed. 1941) 13

1 Story, Equity Jurisprudence (14th ed. 1918) 13

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The petitioner, Detroit Typographical Union No. 18, International Typographical Union, hereby requests the issuance of an order granting certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 20, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, dated December 20, 1972, has not yet been reported. It is reprinted in the Appendix hereto, p. 1a, *infra*.

The United States District Court for the Eastern District of Michigan rendered an oral and unreported opinion on November 14, 1972. It is reprinted in the Appendix hereto, p. 16a, *infra*.

JURISDICTION

The petitioner union filed a complaint under Title III, § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, seeking an injunction restraining the respondents from utilizing certain electronic editing equipment in alleged violation of a so-called "status quo" clause in the collective bargaining agreement. The District Court granted a preliminary injunction on November 14, 1972. On appeal, the Sixth Circuit reversed the order granting the injunction on December 20, 1972. This petition for writ of certiorari has been filed within 90 days from the entry of the Sixth Circuit's judgment of December 20, 1972.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in an action brought under § 301(a) of the Labor-Management Relations Act, a federal court has the prerogative or the power to construe and to enforce a provision of a collective bargaining agreement obligating the parties to maintain the status quo as to wages, hours and working conditions pending arbitration of a contract dispute as to such matters.

2. Whether the construction and applicability of such a status quo provision must be submitted to arbitration along with the basic underlying dispute.

3. Whether, if a federal court has any prerogative or power to enforce a status quo clause, the court must balance the equities between the parties and find severe and irreparable economic injury as prerequisites to ordering enforcement of the clause, or whether a proved violation of the clause alone constitutes sufficient irreparable injury to justify enforcement.

4. Whether the procedural requirements of § 7 of the Norris-LaGuardia Act apply to an action under § 301 (a) of the Labor-Management Relations Act to secure enforcement of a status quo clause pending arbitration of the basic underlying dispute.

STATUTORY PROVISIONS INVOLVED

Section 7 of Norris-LaGuardia Act, 29 U.S.C. § 107:

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or

persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

* * * * * * * * * * *

Section 301(a) of Labor-Management Relations Act, 29 U.S.C. §185(a):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

This controversy involves the enforceability by injunction, in an action under § 301(a) of the Labor-Management Relations Act, of a so-called "status quo" clause. That clause, which appears in the current col-

lective bargaining agreement between the parties to this case,[1] provides quite clearly that

> "When a difference arises as to the interpretation and application of any provision of this Agreement, the wages, hours and working conditions prevailing prior to the change out of which the difference arose, shall be preserved unchanged pending decision by the Joint Standing Committee [or by the arbitrator should the Committee fail to resolve the dispute]." See p. 10a, *infra*.

The dispute as to the enforceability of that clause had its genesis on September 26, 1972. On that date the Detroit News, one of the respondents herein, embarked on a program of installing and utilizing electronic editing equipment known as a CRT. Computer input and/or tapes are prepared on the CRT, resulting in an automatic typesetting of news articles in the newspaper. This equipment was to be operated by editorial employees rather than by composing room employees or printers, represented by the petitioner union. When the union learned of this program it informed the Detroit News management that it would consider the use of this equipment on anything other than a testing basis as a violation of the current collective bargaining agreement between the parties, unless the equipment were operated by composing room employees. The union's position was that Sections 47 and 48 of the agreement require that the equipment be operated only by composing room employees. See pp. 12a-13a, *infra*.

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[1] The parties to the agreement are the petitioner Detroit Typographical Union No. 18 and the respondent Detroit Newspaper Publishers Association, which for bargaining purposes represents the respondent Detroit News and the respondent Detroit Free Press.

This CRT equipment was designed to replace an older teletypesetter operation (TTS) that had been manned by composing room employees known as tape punchers. Approximately 80 tape punchers, represented by the petitioner union, are employed by the News.

It was the union's position that the new CRT equipment should be operated by the tape punchers. The first test tapes on the new equipment were run by editorial employees on September 26, 1972. On October 2, 1972, the News formally acknowledged that a dispute existed over the operation of the CRT equipment and submitted that dispute to the joint standing committee in accordance with the agreement.[2] That committee was unable to resolve the dispute and the matter was thereupon submitted to arbitration pursuant to the agreement. See pp. 3a, 17a, *infra*. There the dispute now rests. The impartial arbitrator heard testimony and oral arguments on January 18 and 19, 1973, and is presently awaiting submission of briefs by the parties. The decision of the arbitrator is obviously some months in the future.

The first test tapes on the CRT equipment were run by editorial employees on September 26, 1972, and the first tapes for live publication of newspapers were run

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[2] As formulated in the Detroit News letter of October 2, 1972, the dispute to be submitted to the joint standing committee read as follows: "Would it be a violation of the Collective Bargaining Agreement for The Detroit News to utilize electronic editing equipment without having to assign ITU members to duplicate work being performed by the electronic editing equipment or by employees in the News' editorial department?" Tr. 131. The correctness or completeness of that formulation of the dispute is not here relevant.

on October 30, 1972. Tr. 89. The union immediately protested by telegram on the latter date that such use of the tape "is a violation of Section 10(b) 'status quo' and you are required to cease the use of such tape and/or computer input until this dispute is resolved under the terms of the agreement." Tr. 134. The News responded that "since we do not believe that the status quo clause is applicable, we will not accede to your request to cease the utilization of such equipment," and that "we are, of course, ready to resolve the dispute regarding applicability of the status quo clause through the appropriate [arbitration] procedure." Tr. 132.

Thus by its actions on October 30, 1972, and subsequently, the News unilaterally effectuated a change in work conditions of those composing room employees who had been operating the older computer equipment known as TTS. From that day forward, all computer operations have been performed on the new CRT equipment by editorial employees.

On October 31, 1972, the union filed its verified complaint in the District Court, seeking a temporary and a permanent injunction against such unilateral use of editorial room employees in operating the CRT equipment pending arbitration. The District Court's jurisdiction thus to compel adherence to the status quo provision was invoked under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.

At the evidentiary hearing in the District Court it was revealed that the News intended to install additional CRT equipment and to insist that it be operated only by editorial employees. Three CRT machines were

in operation in the editorial room at the time of the hearing. It was estimated that thirty-six machines would be in operation by January of 1973 and sixty-two by April or May of 1973. Tr. 49, 86. A representative of the News testified that no union member would be laid off as a result of the installation of this CRT equipment, although changes in work conditions would occur for about 25 of the 500 composing room employees of the News. Tr. 77, 79, 85. It was conceded, moreover, that the CRT operation by non-bargaining unit employees would result in a substantial loss in overtime opportunities and earnings for the tape punchers who had been operating the older TTS equipment. Tr. 79-80.

On November 14, 1972, following this hearing, the District Court issued a preliminary injunction specifically enforcing the status quo provision, pending arbitration of the underlying dispute.[3] In the accompanying opinion (see p. 16a, *infra*) the District Court set forth several considerations thought to justify the injunction:

(1) The language of the status quo provision is clear and demands that the conditions which existed before the dispute must be maintained until the dispute is resolved.

(2) To have any meaning at all, the status quo provision must be read apart from the provision requiring

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[3] The injunction restrained the respondents "from using electronic editing equipment for preparing or producing computer input and/or tapes for live publication unless the computer input and/or tapes are prepared and produced by composing room employees, or unless such computer input and/or tapes are used for test purposes only . . . until determination of the dispute presently pending before the arbitrator." See p. 19a, *infra*.

that all disputes arising out of the operation of the agreement be referred to the joint standing committee. To read it otherwise, as the respondents would do, would render the status quo provision a nullity. Thus rejected was the respondents' argument that because they disputed the applicability of the status quo provision, on the ground that there had been no change in working conditions within the meaning thereof, the applicability of the status quo clause must also be submitted to arbitration.

(3) The status quo had in fact been upset in such a way as to justify intervention by the court. Prior to the installation of the CRT equipment, all computer input and/or tapes were prepared by composing room employees. But that has all been changed, the tapes involved in the CRT equipment being prepared now by editorial employees. And to allow the respondents "to continue to expand their program while the issue is being arbitrated would do violence to the letter and spirit of the collective bargaining agreement." It was to protect against "such irreparable injury" that the District Court determined to issue a preliminary injunction. See p. 19a, *infra*.

The Sixth Circuit reversed. First, it held that it was not the prerogative of the District Court to construe the status quo provision, or to make a factual determination as to its violation, and that the whole status quo matter ought to be determined by arbitration along with the basic underlying dispute between the parties. Secondly, the Sixth Circuit held that in any event the District Court had erred in failing to weigh the equities between the parties and in failing to insist upon a showing of irreparable harm to employees before issuing an injunction, requirements said to be mandated

by *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970). In that connection the Sixth Circuit stated that the fact "that this case involves an injunction against the employer does not mean that the District Court was free to ignore the procedural mandates set forth in §7 of the Norris-LaGuardia Act or to grant an injunction in the absence of irreparable harm." See p. 7a, *infra*.

The Sixth Circuit's reversal of the injunction order was stated to be "without prejudice to any future proceeding that may be instituted seeking an injunction to restrain the Detroit News from terminating any employee as a result of the utilization of the electronic editing equipment pending the arbitrator's determination as to the applicability of the 'status quo' clause and the right of the newspaper to utilize this equipment." See p. 9a, *infra*.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit has rendered totally impotent all collectively bargained clauses seeking to maintain the status quo as to wages, hours and working conditions, pending arbitration of a dispute over a change in those wages, hours or conditions. It has done so by an analysis explicitly rejected by this Court in a line of cases culminating in *Boys Markets*, which dealt with parallel problems as to no-strike clauses.

First, the Sixth Circuit has ruled that federal courts lack the "prerogative" under § 301 of the Labor-Management Relations Act to construe status quo clauses or to determine whether they have been violated. Such clauses must be arbitrated, the court has ruled, and thus cannot be specifically enforced prior to arbitration.

Second, on the inconsistent assumption that status quo clauses are judicially enforceable prior to arbitration, the Sixth Circuit has proclaimed that enforcement must be predicated upon a balancing of the equities and upon a showing of some injury more irreparable than proof of a unilateral work change in violation of the status quo clause. And even then, apparently only the arbitrator can resolve the applicability of the status quo clause to the pre-arbitration period.

These rulings, in the context of the oft-litigated §301, raise important matters of federal labor law and policy. And the importance of these rulings is highlighted by the fact that status quo clauses are a widely used means of aiding and supplementing the arbitration process, described by this Court as the central institution in the administration of collective bargaining contracts. See *Boys Markets, Inc.* v. *Retail Clerks Union,* 398 U.S. 235, 252 (1970).

Because the two rulings of the Sixth Circuit, considered separately or as a confusing combination, are so inconsistent with the federal policy favoring enforcement of arbitration agreements and with this Court's decisions implementing that policy, certiorari should be granted.

1. The Sixth Circuit's decision casts doubt and confusion over the enforceability of an important and widely-used collective bargaining clause.

The status quo clause appears in many collective bargaining agreements other than the one between the instant parties. In the printing industry alone, the International Typographical Union records indicate that the clause appears in 19 of the 21 major city newspaper agreements, and that it also appears in more than

half of the other 2000-plus printing industry contracts throughout the United States. The enforceability of the clause in the printing industry has given rise to other litigation, as witnessed by the pendency before the Third Circuit of the identical enforceability issue in *Pittsburgh Newspaper Printing Pressmen's Union No. 9, et al.* v. *Pittsburgh Press Co.,* Nos. 72-1495 and 72-1496. Those appeals stem from a lower court denial of a preliminary injunction enforcing the status quo clause. *Printing Pressmen* v. *Pittsburgh Press Co.,* 343 F.Supp. 55, 81 LRRM 2436 (W.D. Pa. 1972). Already the Third Circuit, pending the appeals, has restored a lower court restraining order enforcing the clause (see 81 LRRM 2438, 2439). That temporary relief is precisely the kind of enforcement order the Sixth Circuit has held to be beyond federal court prerogative. Should enforcement ultimately be decreed on the appeals, to be argued early in April 1973, such a determination by the Third Circuit would directly conflict with the Sixth Circuit's ruling in the instant case.

Moreover, a study by the United States Department of Labor of significant collective bargaining agreements throughout the United States has revealed the existence of status quo provisions in agreements covering such diverse workers as electricians, machinists, photoengravers, teamsters, copper workers and independent industrial workers.[4] Thus the enforceability of all these status quo provisions in a wide variety of industry contracts is directly affected and indeed threatened by the Sixth Circuit's confusing decision.

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[4] Department of Labor, Collective Bargaining Agreement Grievance Procedures, Bulletin No. 1425-1, pp. 46-47 (November 1964). This report surveyed agreements that covered 1,000 or more workers. The exact number of agreements including a status quo provision was not given.

Even apart from specific status quo clauses, the importance of being able to maintain the status quo pending arbitration has often been recognized by federal courts.[5] In proceedings under the Railway Labor Act, this Court has commented that maintenance of the status quo "traditionally may be made the price of relief when the injunctive powers of the court are involved and the conditions are necessary to do justice between the parties." *Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U.S. 528, 531-532 (1960). Indeed, maintenance of the status quo is an historic equitable device used to preserve conditions giving rise to a dispute, pending litigation or arbitration of the dispute itself. See 2 Pomeroy, Equity Jurisprudence 51, 57-59 (5th ed. 1941); 1 Story, Equity Jurisprudence §§ 69-76 (14th ed. 1918). It gives the decision-maker the opportunity to resolve disputes in their incipient stage, unencumbered by the complications that can flow from a *fait accompli*. Maintenance of the status quo thus aids and eases the arbitration process.

Whether expressed in contract language or utilized as an equitable condition to an injunction, maintenance of the status quo is an important ingredient of federal labor and federal equity jurisprudence. The Sixth Circuit's strange refusal to recognize the judicial enforceability of a status quo requirement, quite apart from the court's inconsistent erection of high hurdles to judicial enforcement, makes a dangerous precedent in both the fields of labor law and equity.

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[5] The Second Circuit, in a case where no specific status quo clause was present, recently noted that in proper cases "the only way to preserve the *status quo* during the pendency of the arbitration proceeding is by the granting of injunctive relief." *Erving* v. *Virginia Squires Basketball Club*, 468 F.2d 1064, 1067 (C.A. 2, 1972).

2. The Sixth Circuit's ruling that federal courts lack power to construe or enforce status quo clauses conflicts with decisions of this Court.

The central and decisive holding of the Sixth Circuit appears to be that "It was not the prerogative of the District Court to construe the 'status quo' clause of the contract or to make a factual determination as to whether there has been a violation of this clause." The Sixth Circuit was unable to see any reason "why this issue, along with the basic underlying dispute between the parties, cannot be determined by arbitration." See p. 5a, *infra.*

In other words, the status quo clause has been likened to an ordinary provision of a collective bargaining agreement that calls for arbitration of any dispute over interpretation or application.[6] Such a reading of the status quo clause misconceives its true nature and is destructive of the established notions, epitomized by *Lincoln Mills* and *Boys Markets*, as to the enforceability of the arbitration process.

(1) By any definition, a status quo clause is ancillary to and thus an integral part of the agreement to submit contract disputes to arbitration. In this case, it is the arbitration agreement itself, Section 10(b),

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[6] In support of its view of the arbitrable nature of the status quo clause, the Sixth Circuit cited its own prior decision in *American Radiator & Standard Sanitary Corp.* v. *Local 7*, 358 F.2d 455, 458 (C.A. 6, 1966). But that case did not involve the arbitrability of a status quo clause. At issue was a dispute over whether management had created new jobs within the meaning of a management prerogative clause of the contract that was outside the scope of the arbitration obligation. That dispute, being factual in nature, was held to be resolvable only by the arbitrator, not the courts. The *American Radiator* decision was thus a correct application of the principles established in the *Warrior & Gulf* part of the *Steelworkers Trilogy*, 363 U.S. 574 (1960), which likewise did not deal with the enforceability of a status quo clause.

that provides *inter alia* for maintenance of the status quo and for "no interruption" in work pending the results of arbitration. In a real sense, therefore, the union has agreed not to strike or otherwise interrupt work as the *quid pro quo* for the publisher's agreement to arbitrate and to preserve the status quo pending arbitration.

(2) This Court has consistently held that the basic components of the arbitration *quid pro quo*, i.e., the no-strike agreement and the promise to arbitrate, are subject to enforcement and application by federal courts in § 301 proceedings prior to arbitration. Thus in *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 451 (1957), federal courts were told "that the agreement to arbitrate grievance disputes . . . should be specifically enforced." And the *Steelworkers Trilogy*, 363 U.S. 564 at 582 (1960), again emphasized that § 301 had assigned the federal courts "the duty of determining whether the reluctant party has breached his promise to arbitrate." Making that determination, of course, requires a court to interpret the arbitration obligation and then act "on the basis of the contract entered into by the parties." *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972).

The other side of the *quid pro quo*, the no-strike obligation pending arbitration, also falls within the power of federal courts under § 301 to interpret and apply and enforce. *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 253-254 (1970). The Court there sanctioned enforcement of a no-strike clause that, by the judicial process of interpreting the clause and assessing the facts, had been found breached. And the Court emphasized that no injunction could issue unless it was first found that the strike was over a grievance

that was subject to arbitration under the contract. 398 U.S. at 254. *Boys Markets* thus provides a method of enforcing a *quid pro quo* obligation that directly contradicts the judicial impotence decreed as to status quo clauses by the Sixth Circuit.

(3) Thus if the status quo clause be read as an integral part of the arbitration *quid pro quo,* the Sixth Circuit's decision cannot be squared with *Lincoln Mills, Steelworkers Trilogy* or *Boys Markets.* Federal courts would appear to be under a mandate from § 301 to interpret such a status quo clause and to determine whether it has been breached; if breached, the clause should be ordered enforced. The ruling of the Sixth Circuit that such matters are outside the "prerogative" of the federal courts is not only wrong as applied to the status quo clause but serves to weaken the judicial power under § 301 to enforce any and all aspects of the pre-arbitration *quid pro quo.*

(4) The Sixth Circuit has done more than undercut the judicial enforceability of the *quid pro quo* obligations. It has also rendered one of those obligations, the status quo promise, completely meaningless and ineffectual. The status quo clause relates only to the pre-arbitration period, precluding unilateral changes in working conditions during the period until arbitration of the underlying contract dispute can be had. But postponing any consideration of the status quo obligation until the arbitration (a) makes it impossible to enforce the obligation during the pre-arbitration period, and (b) moots the obligation, which in any event ends with the arbitrator's decision on the merits of the underlying dispute. As the District Court below remarked (see p. 18a, *infra*):

> ". . . for the status quo provision to have any meaning at all, it must be read apart from the

provision requiring that all disputes arising out of the operation of the agreement be referred to the joint standing committee. To read it otherwise would render the provision a nullity, particularly when the arbitration process drags on, as it often does, for months."

(5) In sum, the Sixth Circuit has made it impossible to enforce the *quid pro quo* obligation to maintain the status quo during the pre-arbitration period. That ruling has wide implications, both practically and legally. It places a premium on unilateral work changes, pending arbitration, despite a negotiated promise to the contrary. And it renders federal courts helpless to enforce the type of obligation heretofore mandated in § 301 proceedings. Such a ruling should be reviewed by this Court.

The *Boys Markets* opinion twice noted that employers "will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly efficacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." 398 U.S. at 248, 252. By the same token, unions will be wary of assuming an obligation to withhold strike action pending arbitration if the employer is free, under the Sixth Circuit's ruling, to violate and ignore the concomitant obligation to maintain the status quo as to working conditions pending arbitration.

3. The Sixth Circuit's ruling that the status quo clause is enforceable only on proof of a high degree of irreparable injury is both confusing and inconsistent with this Court's decisions.

The Sixth Circuit's decision in this case is overtly confusing and internally inconsistent. Having determined that the District Court lacked any "prerogative" to construe or enforce the status quo clause, the Sixth

Circuit in its next breath finds that "we do not hold that an injunction could never issue under a 'status quo' provision" but merely that "the injunction was not issued properly under the facts of this case, where the necessary prerequisites have not been met." See p. 9a, *infra*. Indeed, the opinion closes with an invitation to petitioner to renew its injunctive request if any employee is ever discharged as the result of the installation of the new CRT equipment, such injunction to be effective "pending the arbitrator's determination as to the applicability of the 'status quo' clause and the right of the newspaper to utilize this equipment." See p. 9a, *infra*.

What, then, does the Sixth Circuit's opinion really mean? Was the court serious when it said, without qualification, that federal courts have no "prerogative" to enforce the status quo clause and must leave that entire matter to arbitration? If so, how can they retain sufficient "prerogative" to compel obedience to the clause where certain prerequisites are met? And even if the courts retain that limited "prerogative," at least where employees have been discharged, how can the courts effectively exercise that "prerogative" if the applicability of the status quo clause remains totally subject to the arbitrator's subsequent determination?[7]

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[7] A judicial restraint on such a discharge would appear to turn upon the court's ability to construe and apply the status quo clause. Yet the last sentence of the opinion below states that such an injunction could be effective only "pending the arbitrator's determination as to the applicability of the 'status quo clause'." Does that mean that the applicability of the status quo clause is to be determined first by the court and then by the arbitrator? What effect would a judicial determination as to applicability have on the arbitrator's function of determining applicability?

Such a thicket of confusion fully justifies the grant of certiorari, if for no other reason than to clarify these important areas of federal court jurisdiction and national labor policy. But even apart from the inconsistencies, additional reasons for the grant of certiorari arise out of the Sixth Circuit's notions of what "prerequisites" are necessary to invoke whatever "prerogative" a federal court may have to enforce a status quo clause.

(1) The Sixth Circuit has read this Court's *Boys Markets* decision as requiring a federal court to "weigh the equities between the parties" as a basis for enforcing or denying enforcement of the status quo clause. See p. 5a, *infra*. But *Boys Markets* dealt with the enforcement not of a status quo clause but of a no-strike agreement pending arbitration. And this Court's formulation of the need for balancing equities was confined to the situation where the employer seeks "injunctive relief against concerted activity" in the form of a strike. 398 U.S. at 254. Query whether such a balancing is relevant in the context of the status quo clause, where a violation does not involve a "concerted activity" and where the parties may themselves have balanced the equities beforehand in negotiating the status quo clause. This may well be a situation where the *quid pro quo* elements are not to be regarded as "exact counterweights in every industrial setting," to be wrenched from context. *Drake Bakeries* v. *Bakery Workers*, 370 U.S. 254, 261, n. 7 (1962). What may be a prerequisite for a no-strike injunction may not necessarily be a prerequisite for a status quo injunction.

(2) The Sixth Circuit has also read *Boys Markets* as mandating "a showing of irreparable harm to em-

ployees" as a prerequisite to judicial enforcement of the status quo clause. See p. 5a, *infra*. But since *Boys Markets* dealt only with the strike situation, it may be doubted that the degree of irreparable harm that an employer must show in order to obtain a strike injunction is the same or as low as the irreparable injury necessary to a union's efforts to enforce the status quo obligation. Certainly nothing in *Lincoln Mills* or the *Steelworkers Trilogy* indicates that the enforceability of the agreement to arbitrate is dependent upon a showing of irreparable economic injury or loss of employment. A violation of the agreement to arbitrate carries with it its own intrinsic irreparable injury, an injury to the letter and spirit of the collective bargaining agreement and to the national labor policy favoring arbitration in accordance with the parties' agreement. The same implicit injury occurs, as the District Court here recognized (p. 19a, *infra*), when the employer violates the status quo clause by unilaterally imposing work changes. Like the agreement to arbitrate, the ancillary agreement to maintain the status quo should be enforceable upon proof of a violation, even where no loss of employment or other severe economic injury has resulted. Neither the promise to arbitrate nor the promise to maintain the status quo can be said to be limited to those situations where severe economic injury has ensued.

(3) Finally, the Sixth Circuit has here raised the specter of the applicability of Norris-LaGuardia Act standards for injunctive relief to § 301 proceedings. While perhaps unnecessary to its decision, the court suddenly states in the midst of its opinion (p. 7a, *infra*) that the District Court was not "free to ignore the procedural mandates set forth in § 7 of the Norris-

LaGuardia Act or to grant an injunction in the absence of irreparable harm." Such a statement cannot be allowed to go unchallenged by this Court, for it can cause untold and unnecessary complications in future injunctive actions under § 301. Lower courts need to be reminded that *Lincoln Mills* long ago rejected any such suggestion that the stiff procedural requirements of § 7 of the Norris-LaGuardia Act apply to § 301 efforts to enforce any aspect of the arbitration obligation. "The failure to arbitrate was not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." 353 U.S. 458. And the *Boys Markets* decision fully confirms the *Lincoln Mills* rejection of § 7 of that Act, basing the no-strike injunctive prerequisites on common law equitable concepts.

In short, this case gives this Court the opportunity to determine what degree of irreparable injury, if any, is necessary to justify enforcement of a status quo clause pending arbitration. What are the equities to be balanced, if any? These problems can be resolved on a record where the District Court has found that the status quo clause itself is clear and unambiguous and that the employer has in fact violated that clause by its unilateral work change prior to arbitration.[8]

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[8] The respondents have not challenged the fact that a work change has been unilaterally imposed prior to arbitration. They have protested the applicability of the status quo clause, but only on the ground that the work change is justified under the contract. That is a bootstrap argument. The applicability of the status quo clause is not dependent upon the ultimate correctness of the employer's unilateral action. The clause, as interpreted by the District Court, absolutely bans all work changes pending arbitration, without regard to the decision of the arbitrator as to the propriety of the changes themselves.

4. This case will not be rendered moot on the rendition of the arbitrator's decision as to the merits of the underlying contract dispute.

The decision of the arbitrator as to the contract justification for the work change decreed by the Detroit News, while not expected for some months following the filing of this petition for certiorari, will undoubtedly be forthcoming before this Court can hear and determine the questions herein presented, should certiorari be granted.[9]

But the rendition of the arbitrator's decision will not moot the present controversy. Arbitration by its very nature is short-lived and rarely if ever exceeds the completion of the usual appellate process Moreover, the issue as to the enforceability of the status quo clause, while confined to the very short pre-arbitration period, is capable of repetition under this and all other collective bargaining contracts containing such clauses. Whenever an employer mandates a unilateral work change prior to arbitration, the issue will arise.

As was true with respect to the pregnancy period involved in the Court's recent abortion decision, *Roe* v. *Wade*, No. 70-18, Jan. 22, 1973, the shortness of the pre-arbitration period and the recurring nature of the problem arising therefrom combine to create "a classic justification for a conclusion of nonmootness." Any other conclusion would effectively deny appellate

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[9] It should be noted, however, that by agreement of the parties the issue as to the applicability of the status quo clause has not been submitted to the arbitrator. The necessity and propriety of such a submission, as contemplated by the Sixth Circuit, are questioned in the instant petition.

review of the important questions here involved. See also *Moore* v. *Ogilvie,* 394 U.S. 814, 816 (1969).

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

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APPENDIX

No. 72-2156

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS AND THE DETRIOT FREE PRESS,
Defendants-Appellants,

v.

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION,
Plaintiff-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed December 20, 1972.

Before PHILLIPS, Chief Judge, and PECK and MILLER, Circuit Judges.

PHILLIPS, Chief Judge. This is an appeal under 28 U.S.C. § 1292(a)(1) from the granting of a preliminary injunction in a labor dispute.

Detroit Typographical Union No. 18 (the Union) is the bargaining representative of certain employees of Detriot's two daily newspapers, The News and The Free Press. The current collective bargaining agreement between the parties was signed June 18, 1971, and by its terms will remain in effect through June 17, 1974.

The Detroit News is constructing a publishing building outside the city, which will house its production facilities

now located in downtown Detroit. The news gathering and editorial offices will remain downtown. The distance between the downtown offices and the new plant will be approximately twenty-three miles.

The underlying dispute between the parties grows out of the decision of the newspaper to utilize new electronic editing equipment known as CRT. Both the new and the replaced equipment serve the function of converting typewriter copy into a computer tape which sets the type for printing the newspapers. The Detroit News has directed that the CRT equipment be operated by editorial personnel rather than by composing room employees, members of the Union, who have been operating the replaced equipment.

On or about September 26, 1972,[1] the Detroit News informed the Union of its plan to use the new equipment and that it would not be operated by composing room employees represented by the Union. The Union took the position that the operation of his equipment by personnel other than composing room employees to prepare computer input or tapes for publication would be a violation of the collective bargaining agreement. The Union conceded that management could use the new equipment for test purposes only, but not for live publication.

Applicable parts of the collective bargaining agreement, including the "status quo" provisions of § 10(b), are set forth in the appendix to this opinion.

By letter dated October 2 the Detroit News informed the Union that a dispute existed pursuant to the collective bargaining agreement and that the dispute was being submitted to the Joint Standing Committee, consisting of representatives of the Publisher and the Union. This Committee met on October 12 but was unable to resolve the dispute. By letter dated October 23 addressed to the Union the Detroit News initiated arbitration of the dispute in

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[1] All dates hereafter mentioned in this opinion are 1972.

accordance with the collective bargaining agreement. The issue of whether employees other than those represented by the Union can operate the electronic editing equipment for the preparation of computer input or tapes for live publication is currently in the process of being arbitrated. During arbitration the newspaper is continuing with the installation of the equipment.

On October 30 the newspaper requested members of the Union to use the new equipment for live production, that is, for newspaper publication.

The tape was run as requested, but the Union on the same day sent the following telegram to the Detroit News:

> "YOUR DECISION TO USE THE TAPE AND/OR COMPUTER INPUT CREATED BY TED DOUGLAS, NEWS STAFF WRITER, FOR THE 11:30 a.m. EDITION ON OCTOBER 30, 1972, IS A VIOLATION OF SECTION 47 and 48 OF THE AGREEMENT. THE USE OF SUCH TAPE AND/OR COMPUTER INPUT IS A VIOLATION OF SECTION 10(b) 'STATUS QUO' AND YOU ARE REQUIRED TO CEASE THE USE OF SUCH TAPE AND/OR COMPUTER INPUT UNTIL THIS DISPUTE IS RESOLVED UNDER THE TERMS OF THE AGREEMENT."

Upon receiving this telegram, the newspaper sent a telegram to the Union expressing disagreement with the Union's position that the "status quo" clause of the agreement was applicable to the dispute. In this telegram the newspaper stated its willingness to resolve the dispute regarding the applicability of the "status quo" clause through the appropriate arbitration procedure set forth in § 10 of the collective bargaining agreement.

On October 31 the Union filed its complaint initiating the present litigation under Title III, § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, praying for a pre-

liminary injunction and permanent injunction. The complaint alleged that the Union and its members would suffer irreparable harm unless an injunction was granted restraining the newspaper from utilizing the electronic editing equipment pending an arbitrator's determination of the grievance filed by the Detroit News on October 2. A hearing was held before the District Court November 2 on the Union's application for a preliminary injunction. On November 14 the District Court rendered an oral opinion from the bench in favor of the Union and entered an order enjoining the Detroit News from utilizing the electronic editing equipment for other than test purposes unless it is operated by the composing room employees represented by the Union. This injunction by its terms will remain in effect pending a determination by arbitration of the underlying dispute. The District Court held that the newspaper has violated the "status quo" clause of the contract.

This appeal is from the order granting the injunction. We reverse.

The newspaper filed in this court a motion for stay pending appeal. Oral argument on the motion to stay was heard by a judge of this court on November 24. The appeal thereupon was advanced for hearing on the merits on December 1, and the motion to stay was referred to the hearing panel. Since we reverse the decision of the District Court on the merits, it is not necessary to act upon the motion to stay.

Under the principles enunciated by the Supreme Court in the Steelworkers trilogy,[2] arbitration is favored as a means of resolving labor disputes. Under a collective bargaining agreement providing for binding arbitration, it is not the province of the courts to determine issues of fact which bear upon the question of whether a particular section of the contract has been violated. This is the function of the

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[2] *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 493 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960).

arbitrator. *American Radiator & Standard Sanitary Corp.* v. *Local 7 of the International Brotherhood of Operative Potters, AFL-CIO*, 358 F.2d 455, 458 (6th Cir. 1966). *See also John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 558 (1964).

It was not the prerogative of the District Court to construe the "status quo" clause of the contract or to make a factual determination as to whether there has been a violation of this clause. We see no reason why this issue, along with the basic underlying dispute between the parties, cannot be determined by arbitration.

The fatal defects in the decision of the District Court were: (1) its failure to weigh the equities between the parties and to determine whether the employer would suffer more from the granting of the injunction than the Union from its denial, as required by *Boys Markets Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235, 254 (1970); and (2) the absence of a showing of irreparable harm to employees as mandated by *Boys Markets*.

In *Boys Markets* the Supreme Court adopted the following principles for the guidance of District Courts in determining whether to grant injunctive relief in labor disputes:

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be war-

> ranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." (Emphasis in original.)[3] 398 U.S. at 254.

In his bench opinion in the present case the District Judge did not weigh the equities as between the newspaper and its employees or make any determination as to whether the employer would suffer more from the granting of the injunction than the Union from its denial. Further, the District Court announced only a bare conclusion as to irreparable harm and failed to make findings of fact to support this conclusion. *See Lauf* v. *E. G. Shinner & Co.*, 303 U.S. 323, 330 (1938).

In the above quoted language of *Boys Markets*, the Supreme Court emphasized that the District Court must consider whether issuance of an injunction would be warranted under "ordinary principles of equity." These principles are described by Professor Wright as follows:

> "The classic principles governing availability of injunctions were summarized by Justice Baldwin, sitting at circuit, in 1830: There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an

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[3] The above language was adopted by the court from the dissenting opinion of Mr. Justice Brennan in *Sinclair Refinding Co.* v. *Atkinson*, 370 U.S. 195, 128 (1962). *Boys Markets* overruled *Sinclair*, which had held that the anti-injunction provisions of the Norris-LaGuardia Act precluded a federal district court from enjoining a strike in breach of a no strike obligation under a collective bargaining agreement, even though that agreement contained binding grievance arbitration provisions enforceable under § 301(a) of the Labor Management Relations Act of 1947.

injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction: but that will not be awarded in doubtful cases, or new ones, not coming within well established principles; for if it issues erroneously, an irreparable injury is inflicted, for which there can be no redress, it being the act of a court, not of the party who prays for it. It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured, or great and lasting injury about to be done by an illegal act; in such a case the court owes it to its suitors and its own principles, to administer the only remedy which the law allows to prevent the commission of such act.'

To this day courts continue to stay their hand until there has been a clear showing of irreparable injury for which there is no other adequate remedy." 3 Barron & Holtzoff, *Federal Practice and Procedure* (Wright Ed.) § 1431.

The fact that this case involves an injunction against the employer does not mean that the District Court was free to ignore the procedural mandates set forth in § 7 of the Norris-LaGuardia Act or to grant an injunction in the absence of irreparable harm. *See United States Steel Corp.* v. *United Mine Workers of America*, 456 F.2d 483 (3rd Cir.), *cert. denied*, 408 U.S. 923 (1972); *Local 205* v. *General Electric Co.*, 233 F.2d 85 (1st Cir.), *aff'd*, 353 U.S. 547 (1956); *Clune* v. *Publishers Association of New York City*, 214 F.Supp. 520, 528 (S.D. N.Y.), *aff'd*, 314 F.2d 343 (2d Cir. 1963).

Not only did the District Court fail to make findings of fact showing irreparable harm; the evidence before the District Judges fails to establish irreparable harm to the

Union or the employees. The only injury to composing room employees disclosed by the evidence is a probable loss of overtime, which does not, in our opinion, constitute irreparable harm. Whether employees have suffered a financial loss in the form of reduced overtime and the remedy therefor will be a matter to be determined by the arbitrator.

Robert C. Nelson, operations manager for the Detroit News, testified that no employees will be laid off before April 1, 1973, because of the use of the new equipment.

The Union contends that the irreparable injury to it is not the loss of jobs or wages, but the loss of its bargain with the employer on the "status quo" provision. The Union argues that the "status quo" clause does for it what the no-strike clause does for the newspaper, and that the violation of the "status quo" clause has resulted in destroying this equality of position which is the essence of the collective bargaining agreement. The Union asserts that the resulting damage is not financial but is the consequent appearance to its members that the Union is helpless to discharge its obligations, which is its essential duty and function, and that this loss of confidence of the members would be irreparable. The District Court made no finding that this constitutes irreparable harm, and we do not consider that it could be construed as irreparable harm on the basis of the record in this case. There is no suggestion that the Union is in danger of losing its status as bargaining representative or of suffering a reduction of membership. Like the other phases of the dispute, we hold that the matter of injury to the Union is an issue for determination by the arbitrator.

Although the record does not establish irreparable harm against employees, there is testimony showing substantial injury to the newspaper by the issuance of the injunction. Mr. Nelson testified as follows:

> "Q. Mr. Nelson, as operations manager for the News, what would be the effect on operations, if any,

in the event that the company would not be permitted now to use the electronic editing system on live material for the next five or six months?

"A. You would have quite a serious effect. First of all, we have a substantial capital investment already made in this equipment. We have a substantial amount of money that is contracted to be spent for the equipment as it is delivered. We certainly would not be able to utilize it to the best advantage of our editorial product. This system allows us to turn out a better editorial product. If anything, it would probably drop back. The time that would be required even trying to go to an alternate system and the moneys involved would be very substantial. We certainly don't have much time. We're not talking about much time at all. And the use of any other system is going to result in nothing but duplication of work, a form of featherbedding to me it would be a very serious thing."

As heretofore emphasized, the record discloses no weighing of the equities by the District Court as to whether the employer would suffer more harm from the granting of the injunction than the employees from its denial.

In this opinion we do not hold that an injunction could never issue under a "status quo" provision. We hold merely that the injunction was not issued properly under the facts of this case, where the necessary prerequisites have not been met.

The order of the District Court granitng the injunction is reversed. This reversal is without prejudice to any future proceeding that may be instituted seeking an injunction to restrain the Detroit News from terminating any employees as a result of the utilization of the electronic editing equipment pending the arbitrator's determination as to the applicability of the "status quo" clause and the right of the newspaper to utilize this equipment.

APPENDIX

JOINT STANDING COMMITTEE

Section 10. (a) Immediately after consummation of this Agreement a Joint Standing Committee of four members shall be appointed, two members of said committee to be named by the Publishers, and two members by the Union. In case of a vacancy on the Joint Standing Committee from any cause, said vacancy shall be filled immediately by the appointment of a new member by the party in whose representation on the Joint Standing Committee the vacancy occurs.

(b) To the Joint Standing Committee shall be referred for settlement all disputes arising out of the operation of this Agreement and all disputes regarding the interpretation of any portion of this Agreement. When a difference arises as to the interpretation and application of any provision of this Agreement, the wages, hours and working conditions prevailing prior to the change out of which the difference arose, shall be preserved unchanged pending decision by the Joint Standing Committee. There shall be no interruption and work in the composing room shall continue until a decision is rendered. The foregoing does not require reinstatement of a discharged employee pending a decision. The Joint Standing Committee must meet within ten days (two [2] days in discharge cases) from the date on which either party hereto, through its authorized representatives, notifies the other party in writing that a meeting is desired, and shall proceed forthwith to settle any question before it. Such decision to be final and binding on both parties to this Agreement.

(c) If the Joint Standing Committee cannot reach an agreement on any dispute, including disputes regarding discharged men, within ten (10) days (this time may be extended by agreement) from the date on which the dispute

is first considered by it, at the request of either party hereto they shall select a fifth member from a panel of three arbitrators, to be selected by agreement of the parties within thirty days after the signing of this Agreement, who shall act as chairman. The Committee shall proceed with all dispatch possible to settle the dispute. It shall require the affirmative vote of at least three of the five members to decide the issue, and the decision in all cases shall be final and binding on the parties hereto. The decisions shall be signed by all members of the Committee, but is legal and binding when signed by a majority. Provided, Local Union Laws not affecting wages, hours or working conditions and the 1971 General Laws of the International Typographical Union shall not be arbitrated.

(d) If a discharged employee be reinstated by the Joint Standing Committee or Board of Arbitration either the Committee or the Board of Arbitration either the Committee or the Board has jurisdiction to determine if there shall be pay for lost time, and if so, the amount thereof.

Section 11. (a) All employees who have completed five (5), or more, years of continuous service in one office as of December 31 of any year shall be entitled to vacation credits in the amount of one-eleventh (1/11th) of wages earned the preceding calendar year, such vacation in no case to exceed twenty (20) days.

(b) All other employees covered by this Agreement shall be entitled to vacation credits in the amount of one-sixteenth (1/16th) of wages earned the preceding calendar year, such vacation in no case to exceed fifteen (15) days.

(c) Vacation credits may be liquidated only in the calendar year following the calendar year in which they are earned. Provided, in cases of withdrawal from office prior to December 31 of any year, accrued vacation credits of that calendar year shall be paid to the employee at the time of termination of employment on the basis of one-eleventh

(1/11th) of a day's pay credit for each day's pay earned during that year, or one-sixteenth (1/16th) of a day's pay credit for each day's pay earned during that year, as the case may be.

(d) In case employment ceases because of death of employee the value of accrued vacation credits shall be paid to the heir-at-law of the deceased.

(e) Fractional credits may not be carried forward from one year to another.

(f) No employee will be allowed to forego vacation or any part thereof in any calendar year for the purpose of adding to the length of vacation of any succeeding year.

* * *

Section 47. (a) Both parties to this Agreement recognize Teletypesetter and/or Electro-Typesetter equipment and method of operation, including tape perforator and recutter units, tape box and control board in the production of type, as being within the jurisdiction of the Union.

(b) The Union agrees that operation and maintenance of the reperforator and teleprinter units (used in conjunction with and by the Editorial Department) which the Publishers lease from the AP or UPI, or other recognized news services or syndicates, and which are used by said news services to furnish the Publisers with the daily news report, is not composing room work within the jurisdiction of the Union. The provisions of this paragraph are not to be construed to conflict with the Union's jurisdiction over the operation of keyboard perforators and other equipment as herein provided.

(c) The Publishers may use and employees covered by this Agreement will process:

(1) Tape received from any source which is used for experimental research or test purposes only, and not for publication;

(2) Tape produced by employees covered by this Agreement, and

(3) Markets tabulations, markets fillers, markets tables, sport news and scores of sporting events transmitted by leased wire by the Associated Press, or United Press International News Service in the form of teletypesetter perforated tape. All other tape must be perforated by employees covered by this Agreement.

(d) Teletypsetter and/or Electro Typesetter casting units shall be tended by journeymen or apprentices, in their last two (2) years in a ratio of not more than one (1) to three (3).

(e) It is agreed by both parties hereto that manual operation of linecasting machines (without the use of tape-operated units) may be used on all production for the Publisher's newspaper at his option.

Section 48. When a computer is performing composing roof work, the jurisdiction of the Union includes the preparation of input and all handling of output, operation of the computer and all input and output devices, programming (except that programming which is provided by the manufacturer or lessor as part of the standard services for the lease or purchase of the equipment), and maintenance of all the foregoing equipment and devices.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 72-2156

DETROIT TYPOGRAPHICAL UNION NO. 18,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO
Plaintiff-Appellee,

vs.

DETROIT NEWSPAPER PUBLISHERS
ASSOCIATION, ET AL.,
Defendants-Appellants.

Before: PHILLIPS, Chief Judge, PECK, and MILLER, Circuit Judges.

Judgment

APPEAL from the United States District Court for the Eastern District of Michigan

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

It is further ordered that Defendants-Appellants recover from Plaintiff-Appellee the costs on appeal, as item-

ized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.

/s/ JAMES A. HIGGINS
James A. Higgins
Clerk

Issued as Mandate:
COSTS:
Filing fee .....$
Printing .....$
Total .....$

A True Copy

Attest:
James A. Higgins, Clerk

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 39134

DETROIT TYPOGRAPHICAL UNION No. 18,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO
Plaintiff,

vs.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION,
THE DETROIT NEWS and THE DETROIT FREE PRESS
Defendants.

Oral Opinion of Judge Lawrence Gubow
November 14, 1972

The Court has before it a complaint filed by the Detroit Typographical Union No. 18 for injunctive relief against the Detroit Newspaper Publisher Association, The Detroit News and the Detroit Free Press. A hearing has been held on an order to show cause why a preliminary injunction should not be issued; and at the time of that hearing, the defendants moved to dismiss the complaint. In addition to oral arguments heard by the Court, the Court has had the benefit of written briefs submitted by both sides.

Jurisdiction here is based on Section 301 of the Labor-Management Relations Act, 29 USC, Section 185.

Very briefly, the facts giving rise to the complaint are as follows: On September 26th, 1972, the defendants—or I should say one of the defendants, the Detroit News—embarked on a program to utilize electronic editing equipment known as a CRT, which is to be operated by editorial

employees rather than by composing room employees represented by the plaintiff. When it learned of this program, the plaintiff informed the management of The Detroit News that the union would consider the use of this equipment on anything other than a testing basis as a violation of the collective bargaining agreement currently in effect between the parties, unless the equipment were operated by composing room employees. The union's position in this regard is that Sections 47 and 48 of the agreement require that the equipment be operated by composing room employees represented by the union. On October 2, The Detroit News in a letter to the union acknowledged that a dispute existed over the operation of the equipment and submitted the dispute to the joint standing committee pursuant to the terms of the collective bargaining agreement. The dispute is currently in the process of being arbitrated, and the Detroit News is contining to install the equipment and continuing its operation by editorial employees.

Now, the plaintiff bases its claim for injunctive relief on the operation of the so-called status quo provision of the collective bargaining agreement. Section 10B of the agreement provides, and I quote:

> "When a difference arises as to the interpretation and operation of any provision of this agreement, the wages, hours and working conditions prevailing prior to the change out of which the difference arose shall be preserved unchanged pending decision by the joint standing committee."

The union takes the position that Section 10B prohibits use of the new equipment by anyone other than composing room employees pending determination of the dispute by arbitration since the new equipment performs work heretofore performed by composing room employees and reserved to those employees by the terms of the agreement.

The defendants argue that the status quo provision of Section 10B is not applicable in this dispute, and that since

its applicability is disputed, its effect in this case is for the arbitrator to determine. This argument is based on language in Section 10B immediately preceding the status quo provision, and I quote:

> "To the joint standing committee shall be referred for settlement all disputes arising out of the operation of this agreement and all disputes regarding the interpretation of any portion of this agreement."

The defendants claim that the issue of applicability of the status quo clause is a "dispute arising out of the operation of the agreement" and therefore must be referred to the joint standing committee for arbitration.

The Court cannot accept the defendants' view of the status quo clause. The Court believes that the language of Section 10B, the status quo provision, is clear and demands that the conditions which existed before the dispute must be maintained until the dispute is resolved. The Court also believes that for the status quo provision to have any meaning at all, it must be read apart from the provision requiring that all disputes arising out of the operation of the agreement be referred to the joint standing committee. To read it otherwise would render the provision a nullity, particularly when the arbitration process drags on, as it often does, for months.

In support of the proposition that the applicability of the status quo provision should be subject to arbitration, the defendant has cited cases which stand for the general proposition that procedural prerequisites to arbitration are themselves for the arbitrator to decide. Citing John Wiley & Sons versus Livingston, 376 US 543; American Radiator and Standard Sanitary Corporation versus Local 7 of the International Brotherhood of Operative Potters, AFL-CIO, 358 Fed. 2d 455, a 6th Circuit case. Now, it should be noted that neither case involved status quo provisions such as the one before this Court. Indeed, everything that has been presented to the Court indicates

that arbitration of the principal dispute will proceed regardless of how the status quo issue is resolved. Accordingly, status quo cannot be viewed as a procedural prerequisite to arbitration within the meaning of the cases cited by the defendant. Now, having once accepted the plaintiff's view of the effect of the arbitration clause on the applicability of the status quo provision, it remains to determine whether the status quo has been upset in a way which justifies the intervention of this Court.

Prior to the defendants' program to utilize electronic editing equipment, all computer input and/or tapes used for live publication rather than for testing purposes were prepared by composing room employees represented by Plaintiff. The new equipment changes that situation. It is operated by editorial employees not represented by Plaintiff even though it produces tape and computer input for live publication. Whether or not this change violates specific terms of the collective bargaining agreement is for the arbitrator and not this Court to decide. Meanwhile, however, it is clear that the status quo has been upset in a substantial way. The status quo provision of Section 10B of the agreement is intended to prevent such a change from taking effect until after the merits of the dispute have been resolved through arbitration. To allow the defendants to continue to expand their program while the issue is being arbitrated would do violence to the letter and spirit of the collective bargaining agreement.

To protect against such irreparable injury, this Court will issue a preliminary injunction restraining the defendants from using electronic editing equipment for preparing or producing computer input and/or tapes for live publication unless the computer input and/or tapes are prepared and produced by composing room employees, or unless such computer input and/or tapes are used for test purposes only. This injunction is to remain in effect until determination of the dispute presently pending before the arbitrator.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Supreme Court, U. S.
FILED
APR 13 1973
MICHAEL RODAK, JR., CLE

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION,
Petitioner.

vs.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS, AND THE DETROIT FREE PRESS,
Respondents.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	2
Counter-Statement of the Case	3
Argument Against Granting the Writ	4
1. The Sixth Circuit Properly Held That Construction of the Status Quo Clause Was a Matter for the Arbitrator Rather Than the Court	4
2. The Sixth Circuit's Decision Is in Conformity with Decisions of Other Courts on the Subject	5
3. The Sixth Circuit Correctly Distinguished Between Equitable Relief Designed to Prevent Irreparable Injury and Judicial Enforcement of the Status Quo Clause of a Collective Bargaining Agreement	6
4. Enforcement of a Status Quo Clause Cannot Be Equated to Enforcement of an Agreement to Arbitrate	7
5. The Sixth Circuit Correctly Held That the District Court Was Not Free to Ignore the Procedural Mandates of Section 7 of the Norris-LaGuardia Act	8
Conclusion	9

List of Authorities Cited.

Cases.

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Statutes.

28 U. S. C. § 1254(1) 2

29 U. S. C. § 101 et seq 2

29 U. S. C. § 107 2

29 U. S. C. § 141 et seq 2

Miscellaneous.

New York News, ANPA Labor Bulletin No. 6265 (Dec. 15, 1972) 5

San Jose Mercury, ANPA Labor Bulletin No. 5860 (Jan. 26, 1962) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-1261.

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION,

Petitioner,

vs.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS, AND THE DETROIT FREE PRESS,

Respondents.

BRIEF IN OPPOSITION TO GRANT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Respondents, Detroit Newspaper Publishers Association, The Detroit News, and The Detroit Free Press, hereby files its opposition to granting the writ of certiorari in the above-captioned matter.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. 1A-13A) is not yet officially reported. The United States District Court for the Eastern District of Michigan entered an oral and unreported opinion (Pet. App. 16A-19A) on November 14, 1972.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 20, 1972. The petition for a writ of certiorari was filed on March 15, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether in an action brought under § 301(a) of the Labor-Management Relations Act, a federal district court has the prerogative or the power to construe and pass upon the applicability of a provision of a collective bargaining agreement obligating the parties to maintain the status quo as to wages, hours and working conditions pending arbitration of a contract dispute as to such matters, or whether the construction and applicability of such a status quo provision is properly the province of the arbitrator.

2. Whether, if a federal district court has any prerogative or power to issue injunctive relief in order to maintain the status quo pending arbitration or to enforce a status quo clause, the court must follow the procedural requirements of Section 7 of the Norris-LaGuardia Act (29 U. S. C. § 107) and make specific factual findings of irreparable injury as a prerequisite to ordering such relief, or whether a proved violation of a "status quo" clause alone constitutes justification for enforcement.

STATUTORY PROVISIONS INVOLVED.

The relevant provisions of the Norris-LaGuardia Act (29 U. S. C. § 101 *et seq.*) and the Labor-Management Relations Act (29 U. S. C. § 141 *et seq.*)are set forth in the petition at pp. 3-4.

COUNTER-STATEMENT OF THE CASE.

On September 26, 1972, the Detroit News ("News") informed the Union that it was going to utilize certain electronic editing equipment. The Union told the News that the utilization of this equipment by individuals outside of the composing room for purposes of preparing "computer input and/or tapes for publication" would be considered as a violation of the Collective Bargaining Agreement between the parties.

In an effort to resolve the dispute between the parties the News filed a grievance regarding its right to utilize electronic editing equipment. Failing to reach agreement in the lower steps of the grievance procedure, the matter was submitted to arbitration. An arbitrator selected by the parties heard testimony and arguments on January 18 and 19, 1973.

The News began to utilize the equipment in question on live copy on October 30, 1972. The Union immediately protested on the ground that the News was in violation of the Collective Bargaining Agreement, including the "status quo" provision of the Agreement. On that same day the News informed the Union that in its opinion the "status quo" clause was not applicable to the instant dispute. The News, however, indicated its willingness to resolve any question as to the applicability of the "status quo" clause through the grievance arbitration procedure set forth in the Collective Bargaining Agreement.

Rather than pursue the matter through the grievance and arbitration procedure, the Union filed a complaint for a preliminary and permanent injunction in the District Court. After the holding of an evidentiary hearing, the District Court on November 14, 1972 entered an order enjoining the News from utilizing its electronic editing equipment unless the equipment was operated by members of the Union or was used for test purposes. The sole basis of this order was the District Court's

finding that the News violated the "status quo" clause of the contract (Pet. App. 19A). The Sixth Circuit reversed.

The Sixth Circuit first held that it "was not the prerogative of the District Court to construe the status quo clause of the contract" (Pet. App. 5A). The Court went on to hold that the District Court was bound to follow the procedural mandate of Section 7 of the Norris-LaGuardia Act and that it had failed to "weigh the equities between the parties" or make findings of fact to show irreparable harm (Pet. App. 5A-8A). The Court indicated, however, that the presence of a "status quo" provision did not preclude the granting of injunctive relief if the District Court made specific factual findings of irreparable injury after a weighing of the equities between the parties.

ARGUMENT AGAINST GRANTING THE WRIT.

1. The Sixth Circuit Properly Held That Construction of the Status Quo Clause Was a Matter for the Arbitrator Rather Than the Court.

Whether or not the status quo clause was violated is a question for an arbitrator and not a court. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960); *International Union of Operating Engineers, Local 150* v. *Flair Builders, Inc.*, 406 U. S. 487 (1972). Nothing in the contract exempts "status quo" from arbitration and the record shows that the status quo clause has previously been the subject of arbitration between these very parties.[1] Thus, the Sixth Circuit correctly followed the principles set forth by this

1. The issue of whether the "status quo" clause is applicable to a particular dispute is one frequently presented in newspaper arbitrations. See, *e.g.*, *Hillbro Newspaper Printing Co.*, 28 LA 769 (Hildebrand, 1957); *San Jose Mercury*, ANPA Labor Bulletin No. 5860 (Jan. 26, 1962).

Court in the Steelworkers trilogy[2] in finding the status quo clause arbitrable.

2. The Sixth Circuit's Decision Is in Conformity with Decisions of Other Courts on the Subject.

In *New York Mailers Union No. 6* v. *New York News Inc.*, 81 LRRM 2590 (N. Y. Sup. Ct. 1972), injunctive relief was denied on the ground that it is for an arbitrator and not a court to decide whether a status quo clause was applicable to the particular dispute.[3] Petitioners attempt to establish a *potential* conflict between the Sixth Circuit's decision here and the Third Circuit in *Pittsburgh Newspaper Printing Pressmen's Union No. 9* v. *Pittsburgh Press Co.*, ... F. 2d ...., 81 LRRM 2438 (3rd Cir. 1972) is hardly a reason to invoke this Court's jurisdiction. The District Court in *Printing Pressmen* v. *Pittsburgh Press Co.*, 343 F. Supp. 55 (W. D. Pa. 1972) held that the status quo clause was arbitrable and there is no indication in the summary order of Judge Aldisert to the contrary. Indeed, the Third Circuit in reinstituting the injunction granted by the District Court merely enjoined the Pittsburgh Press Company from laying off certain situation holders in the composing room, relief which the Sixth Circuit specifically indicated could be granted under the terms of its decision (Pet. App. 9A).

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2. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U. S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corp.*, 363 U. S. 593 (1960).

3. That determinations as to the applicability of status quo clauses are for arbitrators and not courts is evident from the decision of Arbitrator Peter Seitz in *New York News*, ANPA Labor Bulletin No. 6265 (Dec. 15, 1972). In *New York News*, a state court had granted an injunction on the ground that there was a violation of the status quo clause. Arbitrator Seitz, however, held that the publisher did not violate that clause and in his judgment the issuance of the restraining order was erroneous and represented a misreading of the parties' agreement.

3. The Sixth Circuit Correctly Distinguished Between Equitable Relief Designed to Prevent Irreparable Injury and Judicial Enforcement of the Status Quo Clause of a Collective Bargaining Agreement.

Petitioner confuses equitable relief designed to maintain the status quo pending arbitration and injunctive relief designed to enforce a status quo clause contained in a collective bargaining agreement. As Petitioner itself states,

> ". . . maintenance of the status quo is an historic equitable device used to preserve conditions giving rise to a dispute, pending litigation or arbitration of the dispute itself." (Pet. at 13.)

By contrast, the District Court did not merely utilize its traditional equitable powers, but rather engaged in a wholesale consideration of the merits of a contractual dispute involving the "status quo" provision of the collective bargaining agreement (Pet. App. at 19A).

Contrary to Petitioner's assertion the Sixth Circuit's decision does not stand for the proposition that injunctive relief designed to maintain the status quo can never be granted. The Sixth Circuit properly held that such injunctive relief can be granted provided the District Court balances the equities and makes findings of fact showing irreparable harm. See *Auto Workers* v. *Budd*, 345 F. Supp. 42 (E. D. Pa. 1972); *Association of Professional Engineering Personnel* v. *Radio Corporation of America*, 183 F. Supp. 834 (D. N. J. 1960). The Sixth Circuit merely held that injunctive relief designed to enforce a *contractual provision* could not be granted insofar as the decision whether the contract clause had been violated was for the arbitrator rather than for the court.

Moreover, Petitioner's assertion that the Sixth Circuit's decision renders all status quo clauses "totally impotent" and "a nullity" (Pet. App. at 10) is mistaken. If the provision is violated an arbitrator can remedy such violation by monetary

relief. See, *e.g., Bieski* v. *Eastern Automobile Forwarding Co.*, 354 F. 2d 414, 417 (3rd Cir. 1965). By definition, if it clearly appears that the arbitrator's award cannot fully remedy such violation, "irreparable injury" might be occurring and a court could then grant injunctive relief pending arbitration as it could in dealing with any other clause in a labor contract. The clause is thus not "a nullity," but rather is fully enforceable.

In this light, the Sixth Circuit's holding that the presence of a status quo clause did not preclude the grant of injunctive relief in appropriate situations is neither confusing nor surprising. It has long been recognized that injunctive relief can be issued under traditional equitable principles in order to preserve the status quo pending arbitration. See, *e.g., United Steelworkers* v. *Blaw-Knox Foundry and Mills Machinery, Inc.*, 319 F. Supp. 636 (W. D. Pa. 1970). Ir granting such relief, however, the courts were *not* making a finding as to the merits of a contractual dispute. The courts in these cases were simply maintaining the status quo on an equitable basis by protecting employee rights pending arbitration of the underlying dispute.

Here the Sixth Circuit properly recognized the distinction between preserving the status quo on an equitable basis and enforcement of a status quo clause. As recognized by the Sixth Circuit it is permissible to preserve the status quo so as to protect employee rights which could not otherwise be adequately preserved pending arbitration, but it is not permissible to find a violation of the status quo clause since this would require the court to pass on the merits of a contractual dispute.

4. Enforcement of a Status Quo Clause Cannot Be Equated to Enforcement of an Agreement to Arbitrate.

Contrary to Petitioner's assertion, the enforcement of a status quo clause cannot be equated to the enforcement of the duty to arbitrate. If injunctive relief were withheld when a party refused to arbitrate, the agreement to arbitrate would be worth-

less. In such a situation, by definition, the arbitrator could not remedy the violation of the contract, and injunctive relief offers the only avenue whereby the injured party could be made whole.

Here, however, injunctive relief is not necessary because the arbitrator may remedy the violation of the contract. Moreover, to allow the court to pass on the merits of this dispute would be contrary to this Court's consistent policy favoring arbitration as the preferred method of settling industrial disputes. In this situation, judicial enforcement of the status quo clause would nullify the right of the News to have the meaning of this clause determined by an arbitrator. To accept Petitioner's argument would thus undermine rather than strengthen the arbitral process.[4]

5. The Sixth Circuit Correctly Held That the District Court Was Not Free to Ignore the Procedural Mandates of Section 7 of the Norris-LaGuardia Act.

The Sixth Circuit's recognition that the District Court was not free to ignore the procedural mandates of Section 7 of the Norris-LaGuardia Act is well-supported. See, *e.g.*, *United States Steel Corp.* v. *United Mine Workers of America*, 456 F. 2d 483 (3rd Cir. 1972), *cert. denied* 408 U. S. 923 (1972); *Clune* v. *Publishers Association of New York*, 214 F. Supp. 520, 528 (S. D. N. Y. 1963), affirmed 314 F. 2d 343 (2nd Cir. 1963), *Local 205* v. *General Electric Company*, 233 F. 2d 85 (1st Cir. 1956), *affirmed* 353 U. S. 547 (1956). Certainly no hardship is entailed by requiring a district court to follow the mandates of Section 7 since these mandates are required under traditional equity principles. *Boys Market* v. *Retail Clerks Union, Local 770*, 398 U. S. 235, 254 (1970). As shown

4. See, *e.g.*, *American Can Co.* v. *Local Union 7420, U. S. W. A.*, ... F. Supp. ....., 81 L. R. R. M. 2706, 2708 (E. D. Pa. 1972) (federal judges "should be wary [that] in preserving the status quo [they] do not act to undermine the favored policy of arbitration.")

above, the finding of irreparable harm has always been a prerequisite to issuing injunctive relief to maintain the status quo on an equitable basis.

CONCLUSION.

For the above reasons, the writ of certiorari should not be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION, *Petitioner*,

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS, and THE DETROIT FREE PRESS, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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April 18, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1261

DETROIT TYPOGRAPHICAL UNION NO. 18, INTERNATIONAL TYPOGRAPHICAL UNION, *Petitioner,*

v.

DETROIT NEWSPAPER PUBLISHERS ASSOCIATION, THE DETROIT NEWS, and THE DETROIT FREE PRESS, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S SUPPLEMENTAL MEMORANDUM

Petitioner files this supplemental memorandum to call to this Court's attention a recent, unreported memorandum opinion of the Third Circuit that bears directly on the appropriateness of granting certiorari in this case. That opinion, which is reprinted in the Appendix herein, is entitled *Newspaper, Newsprint, Mag-*

azine, and Film Delivery Drivers, Local Union No. 211, Appellant, v. *Pittsburgh Press Company,* Appellee, No. 72-2141, dated December 26, 1972.[1]

The Third Circuit's memorandum opinion was rendered six days after the Sixth Circuit's opinion in the instant case, which was dated December 20, 1972. But the Third Circuit obviously was not aware of the Sixth Circuit's opinion when it wrote its memorandum opinion. Nonetheless, the Third Circuit did make approving references to the oral opinion of the District Court for the Eastern District of Michigan in the instant proceeding, as reported at 81 LRRM 2797. And the Third Circuit's action in granting enforcement of the status quo clause pending the appeal is tantamount to a conflict with the Sixth Circuit's refusal to enforce a status quo clause.

The *pendente* restraint issued by the Third Circuit in this *Newspaper Delivery Drivers* case is precisely the kind of enforcement of a status quo clause that it had earlier decreed in June of 1972 pending the appeals in *Pittsburgh Newspaper Printing Pressmen's Union No. 9, et al.* v. *Pittsburgh Press Co.* (81 LRRM 2438, 2439), referred to at page 12 of the Petition for Certiorari herein.[2] More importantly, that kind of en-

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[1] Petitioner's counsel were unaware of this memorandum opinion prior to the filing of the Petition for Certiorari on March 15, 1973.

[2] The appeals in *Printing Pressmen's Union No. 9* were argued orally to the Third Circuit on April 3, 1973, and are under advisement by that court. That court is aware not only of the Sixth Circuit's decision in the instant proceeding but of the pendency before this Court of the Petition for Certiorari herein. Should the Third Circuit follow its tentative thinking as indicated herein and order the enforcement of the status quo clause in the *Printing Pressmen's Union No. 9* proceedings, that result would directly conflict with the result reached below by the Sixth Circuit.

forcement reflects an exercise of judicial power or prerogative that the Sixth Circuit has here said was beyond the scope of a federal court's jurisdiction under § 301(a) of the Labor-Management Relations Act. Additionally, the rationale now supplied by the Third Circuit in justification of its twice-exercised enforcement of a status quo clause pending an appeal reveals a concept of the irreparable injury necessary to enforcement that is totally different from and in conflict with the concept expressed by the Sixth Circuit.

Giving due weight to the fact that the Third Circuit has been dealing so far only with temporary enforcement of the status quo clause pending an appeal, the extent of the differences between the two Circuits may be expressed as follows:

Third Circuit	*Sixth Circuit*
1. "Once it is found that the issues [on the merits of the dispute] are arbitrable, then it is arguable that the matter is properly a grievance subject to the status quo section. In the present posture of this appeal, we do not resolve this issue. We hold simply that at this time we cannot rule, without more, that Section 18 [of the agreement on which the company relied in justification of its work change] is absolutely controlling, precluding any possibility of applying the status quo section." See page 5a of Appendix hereto, *infra*.	1. "It was not the prerogative of the District Court to construe the 'status quo' clause of the contract or to make a factual determination as to whether there has been a violation of this clause. We see no reason why this issue, along with the basic underlying dispute between the parties, cannot be determined by arbitration." See page 5a of Appendix to Petition for Certiorari.

Third Circuit

2. "Accepting the premise that the issues [on the merits] are arbitrable, we cannot, at this stage, rule, as a matter of law, that violation of the status quo during arbitration is not in itself an irreparable harm to the plaintiff.

"The plaintiff is a union. The status quo section obviously represents a union victory at the collective bargaining table which created the 1972 agreement. The union contends that any rupture of this status constitutes irreparable harm. Self-descriptive by nomenclature, irreparable harm, as a ground for equitable relief, is what cannot be repaired, restored, put back again, atoned for, but may exist although the injury is compensable in damages and is not very great where there is actual and substantial injury of such character that the law cannot give adequate compensation or fair or reasonable redress. [Citing District Court oral opinion in the instant *Detroit* case.]

"Accordingly, we hold that whether the district court erred in its finding of irreparable harm is an

Sixth Circuit

2. "The Union contends that the irreparable injury to it is not the loss of jobs or wages, but the loss of its bargain with the employer on the 'status quo' provision. The Union argues that the 'status quo' clause does for it what the no-strike clause does for the newspaper, and that the violation of the 'status quo' clause has resulted in destroying this equality of position which is the essence of the collective bargaining agreement. The Union asserts that the resulting damage is not financial but is the consequent appearance to its members that the Union is helpless to discharge its obligations, which is its essential duty and function, and that this loss of confidence of the members would be irreparable. The District Court made no finding that this constitutes irreparable harm, and we do not consider that it could be so construed as irreparable harm on the basis of the record in this case." See page 8a of Appendix to Petition for Certiorari.

Third Circuit

arguable question; one which will be resolved at the decision on the merits of this appeal. Pending disposition thereof, we are constrained to grant an injunction pending appeal. . . . It is the thrust of appellant's argument that the loss of the status quo is irreparable. Although we do not decide that issue, we will preserve that status. To hold otherwise would dissipate completely the very status which is central to this litigation and also deprive appellant of the opportunity of litigating the issue." See pages 6a-7a of Appendix hereto, *infra*.

Sixth Circuit

Thus the Third Circuit has given express recognition to the possibility that a violation of the status quo clause may in itself constitute sufficient irreparable harm to the union's status and to the collective bargaining process to justify the enforcement of the status quo clause. To that extent, the memorandum ruling is at odds with the Sixth Circuit's blanket refusal to acknowledge that the violation of the clause is or can be a *per se* irreparable injury. See Petition for Certiorari, pages 19-21.

Only a few words need be added here in response to the respondents' Brief in Opposition, which serves to highlight and compound the confusion permeating the Sixth Circuit's opinion:

(1) Respondents seemingly concede (Br. Opp. 4) that the first and central holding of the Sixth Circuit is that a federal court lacks any "prerogative" to construe the status quo clause or to make a factual determination as to a violation thereof. The court said that such matters must be left to the arbitrator, acting at the termination of the pre-arbitration period. But respondents fail to explain how the arbitrator could ever make the status quo clause effective during the pre-arbitration period. An arbitrator's award of damages or back pay is not the equivalent of the suspension of unilateral work changes ordered by the employer during the pre-arbitration period, which suspension is the sole object of the status quo clause. Unless such a suspension is made effective during the pre-arbitration period, the clause is rendered totally impotent.[3]

(2) Respondents, in defending the second alternative holding of the Sixth Circuit (Br. Opp. 6-9), fail to explain how federal courts suddenly acquire the "prerogative" to construe the status quo clause and to determine a violation thereof when confronted with proof of irreparable injury by the union or its affected members. And they fail to explain the Sixth Circuit's insistence that even where the federal courts can enjoin violations of the status quo clause the arbitrator still retains final authority to determine the applicability of the clause in the first instance. See page 9a

[3] Respondents assert (Br. Opp. 7) that if the arbitrator's award cannot fully remedy a violation of the clause "irreparable injury" might be occurring so as to permit injunctive relief pending arbitration. But this is a meaningless argument in light of the Sixth Circuit's notion that "irreparable injury" must take the form of discharge, which could be remedied by the arbitrator. What other form of "irreparable injury" would satisfy the Sixth Circuit's idea of when a court injunction can issue?

of Appendix to Petition for Certiorari, and page 18 of Petition.

(3) Respondents, in reiterating (Br. Opp. 6-7) the Sixth Circuit's requirement that proof of "irreparable injury" precede judicial enforcement of the status quo clause pending arbitration, fail to recognize that the status quo clause is meant to be effective and enforced irrespective of whether a change in working conditions is accompanied by "irreparable injury" in the form of discharge or lay-off. That is precisely why the Sixth Circuit's insistence on a discharge as the price of judicial enforcement is contrary to the purpose and thrust of the status quo clause and the arbitration process of which it is a part. And that is why the District Court below and the Third Circuit in the attached *Newspaper Delivery Drivers* case are more faithful to the concept of the status quo clause in recognizing that an alteration of the status quo by any means justifies enforcement of this vital part of the arbitration *quid pro quo*.

(4) Respondents' final assertion (Br. Opp. 8-9) that a federal court dare not ignore the procedural mandates of § 7 of the Norris-LaGuardia Act emphasizes anew the need for reminding the lower federal courts and the labor bar that the arbitration process and the enforcement thereof are "not a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 458 (1957).[4]

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[4] Respondents, in support of their broad assertion that § 7 indiscriminately applies, cite *United States Steel Corp.* v. *United Mine Workers*, 456 F.2d 483, 487-8 (C.A. 3, 1972), which merely held that in a § 301 suit reasonable attorney fees could be recovered pursuant to § 7. The Third Circuit recognized that many other provisions of § 7 are inapplicable.

CONCLUSION

These various considerations augment the reasons why certiorari should be granted to review the judgment and opinion of the Sixth Circuit in this case.

Respectfully submitted,

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April 18, 1973

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-2141

NEWSPAPER, NEWSPRINT, MAGAZINE, AND FILM DELIVERY DRIVERS, LOCAL UNION NO. 211, *Appellant*,

v.

PITTSBURGH PRESS COMPANY.

Appeal from the United States District Court for the Western District of Pennsylvania.

MEMORANDUM OPINION SUR MOTION FOR INJUNCTION PENDING APPEAL

Present: SEITZ, *Chief Judge*, and ALDISERT and ROSENN, *Circuit Judges*.

Before the court is a motion for injunction pending appeal filed in accordance with F.R.A.P. 8, originally presented before the resident Circuit Judge in the Western District of Pennsylvania who heard oral argument thereon on December 16, 1972, and by him referred to a panel of this court for disposition.

We hold that the December 14, 1972, order of the district court denying the request for preliminary relief is an appealable order although styled by the court as a denial of "a temporary restraining order." Appellant's complaint

was filed December 8, 1972, requesting preliminary and permanent injunctive relief from work changes proposed by the company outlined in a letter dated December 1, 1972. On December 8, 1972, the court issued an order fixing a hearing on a preliminary injunction for December 11, 1972. The defendant was given proper notice thereof. The case was then assigned to another judge who set a hearing for December 13, 1972.

At the beginning of this hearing, the court stated, "Well now, I will give you a hearing on a temporary restraining order. You have asked for a hearing on a preliminary injunction, but I think you know that the other side is entitled to twenty days to file an answer to your complaint for a permanent injunction and if you want a hearing on the preliminary injunction, I will set it for some time in January, the week of January 8."[1]

On a request for a preliminary injunction the relevancy of pleadings necessary for a permanent injunction is at best evanescent; in this case, it is non-existent. Thus, pleading rules formed no bar to a hearing on appellant's request. The court further reasoned that the earliest that plaintiff could be heard on its request for a preliminary injunction was the week of January 8, 1973. Thus, faced with a dispute over a collective bargaining agreement expiring on December 31, 1972, the court ruled that the union could not have a hearing on a preliminary injunc-

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[1] It is possible that the district court was misled by the position taken by defense counsel:

> We want to reserve the right to file an answer. If this matter is to be treated as a motion for preliminary injunction, we would certainly want the transcript of the court so that we may prepare a proposed findings of fact and conclusions of law. I would ask for the opportunity to prepare that as well as an extensive brief and memorandum of the law on these issues.

[Record, at 78.]

tion until eight days after the contract expired. We find it difficult to accept that the District Court for the Western District of Pennsylvania, consisting of twelve active and senior districts judges could not entertain a petition for a preliminary injunction filed December 8, 1972, until thirty days thereafter.[2] Moreover; we observe that the life of a temporary restraining order is ten days. Unless there was consent by the parties, additional court action was mandated prior to January 8, 1973.

Because there was no effort by the plaintiff to request relief without notice, and it appearing that the defendant was given timely notice of the hearing and participated actively therein in cross-examination, in the presentation of evidence and in oral argument, we are unwilling to construe the proceedings as a hearing on a temporary restraining order. The relief requested was for a preliminary injunction and the denial of that relief, irrespective of the label attached thereto by the district court, was a denial of a request for a preliminary injunction which constitutes an appealable order. 28 U.S.C. § 1292(a)(1).

The facts are not in dispute. Following changes, authorized by arbitration awards which affected other labor unions of the Pittsburgh Press, the company sent a letter to the union on December 1, 1972, suggesting job changes. The company contends:

> Attendant to this elimination of the [printing] press are certain other changes resulting therefrom directly at issue here, i.e., the elimination of two jobs on the loading dock which work directly off that press. In addition, circulation adjustments require the elimination of one of the three weekend trips to Fairmont, West Virginia, and the elimination of helpers on certain weekend delivery trucks.

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[2] Although that court operates under the individual calendar system, we have previously observed that the hearing judge was not the original judge to which the case was assigned.

> These changes are necessitated because of the disastrous effects the two-week strike of the Pressmen's Union and the eighteen-week strike of the Printer's Union have had on the circulation and advertising of the newspapers. [Description of circulation and advertising losses omitted.] Total payroll costs for the employees represented by appellant union have risen in excess of 125%. Similar increases in employee-count and payroll costs have been gained by employees represented by other unions at appellee's paper.
>
> It is obvious from the above that the simple changes planned by appellee in the instant case are not only necessary but are vital to the future of viable newspapers in the City of Pittsburgh.

[Appellee's brief, pages 4-5.]

This litigation therefore, concerns "the elimination of two jobs on the loading dock" and "elimination of one of three weekend trips to Fairmont, West Virginia, and the elimination of helpers on certain weekend delivery trucks." It would appear that resolution of this dispute in the district court at the final hearing will require an accommodation of two sections of the collective bargaining agreement between the parties that expires December 31, 1972.

Appellant relies on Section 14:

> During the processing of a grievance, business shall be continued without interruption in a normal and orderly manner and the matter or matters in dispute, except cases of discipline resulting from a serious offense, shall revert to the status quo prevailing immediately prior to the time the grievance arose until a final decision of the matter or matters at issue shall have been reached.

Appellee relies on Section 18:

> The Company shall be the judge of the number of men to be employed and shall have the right to lay

> off. (This right is not superseded or abridged by any other Section or provision of this Contract or by any provision of this paragraph.)

Appellant contends that although the company "shall be the judge of the number of men to be employed and shall have the right to lay off," this can only be done after arbitration if the proposed action is considered a grievance by the union; that if the union considers it to be a grievance and gives notice, then it must be processed to arbitration during which the status quo shall be maintained under Section 14.

Appellee contends that the language of Section 18 controls absolutely, arguing that it has the right to lay off, and that this right is "not superseded or abridged by any other Section or provision" of the contract. Whatever appeal this argument may have had prior to the hearing, the district court has held otherwise, apparently upon a concession made by the appellee:

> At the hearing, the plaintiffs presented testimony that the defendant intended to change or alter its delivery routes because of decreased circulation. The defendant presented testimony that no one would be laid off, but there is a possibility of a decrease in overtime work and a change in job assignments. *The parties agree that the questions heretofore mentioned are arbitrable.*

We view as significant this finding by the court. Once it is found that the issues are arbitrable, then it is arguable that the matter is properly a grievance subject to the status quo section. In the present posture of this appeal, we do not resolve this issue. We hold simply that at this time we cannot rule, without more, that Section 18 is absolutely controlling, precluding any possibility of applying the status quo section.

It is necessary, however, that we relate this finding to other findings of the court: "The court therefore, upon the evidence presented to date, finds that neither the plaintiff nor any of its members will suffer irreparable harm and the defendant will suffer more from the granting of a temporary restraining order." Accepting the premise that the issues are arbitrable, we cannot, at this stage, rule, as a matter of law, that violation of the status quo during arbitration is not in itself an irreparable harm to the plaintiff.

The plaintiff is a union. The status quo section obviously reflects a union victory at the collective bargaining table which created the 1972 agreement. The union contends that any rupture of this status constitutes irreparable harm. Self-descriptive by nomenclature, irreparable harm, as a ground for equitable relief, is that what cannot be repaired, restored, put back again, atoned for, but may exist although the injury is compensable in damages and is not very great where there is actual and substantial injury of such character that the law cannot give adequate compensation or fair or reasonable redress.[3] *De Luxe Motor Cab Co.* v. *Dever*, 252 Ill. App. 156.

Accordingly, we hold that whether the district court erred in its finding of irreparable harm is an arguable question; one which will be resolved at the decision on the merits of this appeal. Pending disposition thereof, we are constrained to grant an injunction pending appeal.

We are influenced by the reality that the contract expires in less than two weeks. It is the thrust of appellant's argu-

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[3] *Typographical Union* v. *Publishers Ass'n.*, (E.D. Mich.), 81 LRRM 2797, 2798 (Nov. 14, 1972), states:

> The Court also believes that for the status quo provision to have any meaning at all, it must be read apart from the provision requiring that all disputes arising out of the operation of the agreement be referred to the joint standing committee. To read it otherwise would render the provision a nullity, particularly when the arbitration process drags on, as it often does, for months.

ment that the loss of the status quo is irreparable. Although we do not decide that issue as we will preserve that status. To hold otherwise would dissipate completely the very status which is central to this litigation and also effectively deprive appellant of the opportunity of litigating the issue.

Notwithstanding the foregoing, the company offers the sound argument that should it prevail ultimately at arbitration it will have incurred substantial out-of-pocket costs pending arbitration. "It is estimated by the appellee that the issuance of an injunction will result in $1300.00 per week of unnecessary costs." [Appellee's brief, page 14.] We believe that the company should not be exposed to substantial losses if improvidently prevented from instituting the work changes at the desired time schedule.

We will therefore require appellant to file a special surety bond in double amount of the possible losses to which the company may be exposed by December 31, 1972, directly relating to work schedules of those members of plaintiff union described in its letter of December 1, 1972. Using the estimates furnished by appellee in its brief, page 14, we calculate this loss to be a total of $2600.00 for a two-week period. Appellant will be required to post this bond with the Clerk of the district court. Should the company prevail at arbitration on the issues which constitute the subject matter of this specific litigation, it shall have direct recourse to this surety bond for those losses actually sustained by it between December 17, 1972, and December 31, 1972, resulting from its being prevented from implementing the work changes of members of plaintiff union described in its letter of December 1, 1972, to the union.

Concurring and dissenting opinion by Judge Rosenn:

I agree with the majority that the filing of an answer is unessential to a hearing on an application for a preliminary injunction. Under the circumstances described in the

majority opinion, consideration of the hearing in the district court as an application for a preliminary injunction is not inappropriate. I agree therefore that the order before us is appealable. I dissent only because the limited issue before us on this motion for injunctive relief pending appeal is whether there was a clear abuse of discretion by the district court. Since the evidence adduced is unrefuted that no employees constituting members of the appellant union will be laid off and the change in operations of the employer involves only a reshifting of personnel to other jobs, I am unable on motion only to hold that the district court abused its discretion that upon the evidence presented to date "that neither the plaintiff nor any of its members will suffer irreparable harm and the defendant will suffer more from the granting of a temporary restraining order".

Order

For the reasons set forth in the foregoing memorandum opinion, it is ORDERED that pending disposition of this appeal the Pittsburgh Press Company, its officers, agents, and representatives be and are hereby restrained from implementing the work changes described in its letter of December 1, 1972, to Newspaper, Newsprint, Magazine, and Film Delivery Drivers, Local Union No. 211. This Order shall be conditioned upon appellant's deposit in the amount of $5200.00 with the Clerk of the United States District Court for the Western District of Pennsylvania subject to the conditions set forth in the foregoing memorandum opinion.

BY THE COURT,

/s/ ALDISERT, J.
Circuit Judge

Dated: December 26, 1972